

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERTO PATINO, et al . C.A. NO. H-14-3241
VS. . HOUSTON, TEXAS
CITY OF PASADENA, et al . AUGUST 24, 2016
8:45 A.M. to 10:27 A.M.

TRANSCRIPT of MOTION HEARING
BEFORE THE HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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P R O C E E D I N G S

THE COURT: Good morning.

MS. PERALES: Good morning.

THE COURT: Go ahead and state your appearances, and then you can be seated.

MS. PERALES: For the plaintiffs, good morning, Your Honor, Nina Perales. With me is Mr. Ernest Herrera. And also I would like to introduce our summer law clerk, Ms. Carmel Dooling, a student at the University of Chicago Law School.

THE COURT: Oh, welcome, Ms. Dooling. You're going to be quite well-educated. In fact, you already are.

Thank you. You may be seated.

MR. HEATH: Robert Heath for the City of Pasadena. And with me are Kelly Sandill and Katie Ahlrich.

THE COURT: All right. Thank you.

All right. We have before us the summary judgment motion of the defendants, which I would like to discuss as soon as we discuss a part of the issue -- a part of the puzzle, if you will, that is not perhaps the largest issue, but is going to determine in part what we consider in resolving the larger issues, and that's the challenge to Ms. McCall's information being included in what we consider. She submitted a declaration, which the defendants themselves say is not essential to but is relevant to their motion particularly relating to the proportionality defense, if you will, that they

1 have asserted under the Senate report factors. And I propose,
2 therefore, to take up the challenge to her declaration as
3 primarily being untimely disclosed and having to -- or to the
4 extent that it utterly deprived the plaintiffs of any
5 opportunity to conduct any discovery into the basis of the
6 information and opinion statements contained in her
7 declaration. So let's take that up first.

8 That is your motion, Ms. Perales.

9 *MS. PERALES:* Thank you, Your Honor.

10 Expert disclosures in this case were due on
11 December 16th, 2015. Discovery closed on May 31st. The City
12 moved for summary judgment on July 1st, and the City disclosed
13 to the plaintiffs Ms. McCall's and Dr. Rives' geocoded database
14 on August 3rd, earlier this month.

15 Ms. McCall's declaration is an expert report. In
16 addition to listing her extensive qualifications, Ms. McCall
17 performed a very sophisticated analysis. She, as part of her
18 work in database management, assigned citizen voting age
19 population from the U.S. Census from the census block level
20 down -- census block group level down into census blocks, which
21 required a mathematical methodology based on the presence of
22 voting age population. So she attributed citizen voting age
23 population down into blocks where she did not have that data
24 based on existing voting age population, using a computer,
25 using, as she described in her report, ratios.

1 She also geocoded every registered voter's home
2 from the address listed in the registered voter list onto
3 essentially rooftops that she had present in another database
4 that she had of --

5 *THE COURT:* May I ask a seemingly perhaps trivial
6 question? Is "geocoding" a word unique to this lexicon?

7 *MS. PERALES:* Honestly, I do not know, Your Honor.

8 *THE COURT:* It's a very useful word. I'm not
9 quarreling with its application here, but it does seem to be
10 kind of a idiosyncratic term, not exactly a word even.

11 *MS. PERALES:* I haven't come across it in other
12 contexts, Your Honor.

13 *THE COURT:* Nor have I. It would be a crossword
14 stumper.

15 *MS. PERALES:* And it's a fairly sophisticated thing
16 that you would do in a case like this, where county precinct
17 boundaries are cut by the City's redistricting plan, where you
18 cannot simply take existing data on the number of registered
19 voters or Spanish surname registered voters in a particular
20 precinct, because those folks may be in District A and District
21 B. And so what Ms. McCall did, using very sophisticated
22 software, was physically map the addresses down onto a map,
23 figure out where the line was, and then figure out who was in
24 which district.

25 She also then proceeded to layer over all of this

1 information the City's old 8-0 redistricting plan. She also
2 layered on top of this the City's new 6-2 redistricting plan,
3 and then performed what's known as a plan overlap analysis.
4 All of this is something that was done with data that she was
5 able to get ahold of, much of which was public, but which was
6 not clerical in any sense. Although, as an attorney, I
7 understand what she describes as doing, it's not something that
8 I or any person --

9 *THE COURT:* You're an attorney with particular
10 knowledge, expertise, and experience in this field. That makes
11 you an expert able to understand what may be expert work on her
12 part.

13 *MS. PERALES:* Yes, Your Honor, but I could not do that
14 work.

15 *THE COURT:* I understand that.

16 *MS. PERALES:* And so it is true that we knew that
17 Ms. McCall --

18 *THE COURT:* You couldn't make the computers do that
19 work.

20 *MS. PERALES:* I could not. I can work an Excel
21 spreadsheet, but this is far beyond -- far beyond that.

22 Although the plaintiffs knew of Ms. McCall's
23 existence and her identity and we knew that she had some
24 knowledge of the facts of the case, she was not listed in the
25 initial disclosures by the City and she was never disclosed as

1 an expert witness.

2 Dr. Rives discussed Ms. McCall's work in his
3 deposition, and we took him at his word. He said that she
4 prepared the database under his direction and that she gave it
5 to him for his analysis. And he very clearly limited his
6 analysis with that data to the City's 6-2 redistricting plan
7 and citywide demographics.

8 We did not know that Ms. McCall would perform
9 additional analysis, including of the 8-0 redistricting plan
10 that existed before. We did not know that she would do also a
11 plan overlap analysis on the dataset that she prepared for
12 Dr. Rives. And we did not know that she would testify until
13 July 1 when we saw the declaration.

14 *THE COURT:* How are you prejudiced by the untimely
15 surfacing of her declaration?

16 *MS. PERALES:* Plaintiffs would want the opportunity to
17 respond to the conclusions that are presented by Ms. McCall.

18 *THE COURT:* Would you need her deposition?

19 *MS. PERALES:* We would need her deposition. We would
20 need an opportunity for Mr. Ely to perform his own analysis on
21 the recently disclosed geocoded database; and then, in
22 fairness, the City would probably want an opportunity to depose
23 Mr. Ely on his conclusions or his rebuttal report.

24 *THE COURT:* To the extent it was new?

25 *MS. PERALES:* To the extent that he has a different

1 view of things.

2 *THE COURT:* Right.

3 *MS. PERALES:* The only issue in terms of a
4 continuance, and this is a second prejudice that was perhaps
5 not well-articulated in our original motion, is that the next
6 City election is coming up in May of 2017. If we push the
7 trial into November, it will give the Court very little time to
8 rule.

9 *THE COURT:* No, I appreciate that. And when does
10 early voting in that election begin?

11 *MS. PERALES:* More importantly, candidate filing
12 opens --

13 *THE COURT:* Right.

14 *MS. PERALES:* -- in January, I believe. Is that --

15 *THE COURT:* January?

16 *MS. PERALES:* January.

17 *THE COURT:* So we really have a hard stop of happy
18 new -- of January 1 --

19 *MS. PERALES:* Yes.

20 *THE COURT:* -- to resolve the map?

21 *MS. PERALES:* Judgment and remedy.

22 *THE COURT:* Right. Okay. Which mandates, if summary
23 judgment is denied, keeping the current trial schedule and
24 simply allowing some additional discovery, if I agree with your
25 position on Ms. McCall, between now and when the docket call is

1 set to occur.

2 *MS. PERALES:* That is in about four weeks, Your Honor.
3 Docket call is September 26. We're not sure that it's humanly
4 possible for Mr. Ely to receive the geocoded database --

5 *THE COURT:* Even if we extended docket call two more
6 weeks and try to hold the trial in early November? That would
7 probably work.

8 *MS. PERALES:* Well, we would have to take Ms. McCall's
9 deposition almost immediately.

10 *THE COURT:* Yes.

11 *MS. PERALES:* And then Mr. Ely would have maybe --
12 well, without a transcript, I mean, we would be looking at
13 getting the transcript in two weeks.

14 *THE COURT:* You can get a transcript on an expedited
15 basis, I suspect, and I don't mean to be facetious or suggest
16 that this would be necessary, but there's a reason they call it
17 Labor Day.

18 *MS. PERALES:* Yes, Your Honor. I've been there with
19 that.

20 *THE COURT:* We may be working.

21 *MS. PERALES:* Thank you, Your Honor.

22 *THE COURT:* And I hope that's not necessary, but
23 clearly there will -- in order to meet -- unless summary
24 judgment is granted on all grounds, ending the case entirely,
25 everybody is going to have a significant amount of work to do

1 between now and happy new year.

2 *MS. PERALES:* Thank you.

3 *THE COURT:* Thank you, I think.

4 Your response on Ms. McCall, please.

5 It seems to me that your response is -- on the
6 written material, focuses on the fact that there was some
7 information about her involvement known to the plaintiffs
8 before you said anything -- your people said anything, because
9 they themselves disclosed the existence of Ms. McCall and the
10 fact that she had some relevant knowledge, although not
11 necessarily relevant to the particular conclusions she has
12 proffered, number one. And, number two, that during the
13 depositions of other witnesses in this case, your witnesses,
14 the fact that Ms. McCall played a role in number crunching was
15 revealed.

16 *MR. HEATH:* That's exactly correct, Your Honor. They
17 revealed her as a witness with relevant knowledge. They know
18 who Ms. McCall. They --

19 *THE COURT:* They being the plaintiffs?

20 *MR. HEATH:* They being the plaintiffs. We have
21 litigated. They have known Ms. McCall for years, and they know
22 what her role is. But it's -- and then in the deposition --
23 well, first, let me back up a second. In their original motion
24 they said, Well, we knew who she was, but we thought that she
25 was going to testify about election returns. And that was just

1 a misreading of their own document, because if you go and look
2 at their document on page -- well, whatever --

3 *THE COURT:* Which document?

4 *MR. HEATH:* -- it is, they describe the knowledge of
5 each person --

6 *THE COURT:* All right. The initial disclosure?

7 *MR. HEATH:* The initial disclosures, that's right.
8 Thank you, Your Honor. They describe the knowledge of each
9 person and they had Stan Stanart and another person from the
10 Election Division at the Harris County Clerk's Office, and they
11 said the above persons, Mr. Stanart and the other person, whose
12 name escapes me right now, have knowledge about election
13 returns. The next person on the list -- that was Item G. The
14 next person, Item H, was Ms. McCall. And under her name it
15 says she knows about drafting redistricting plans.

16 So, in the original motion they said, "We thought
17 she was going to talk about election returns." That's not what
18 they had originally said at all in their initial disclosures.
19 They knew she knew about the redistricting plans. But they,
20 going back after the fact, just pulled the wrong thing out of
21 their disclosures.

22 Now, Mister -- when they deposed Dr. Rives, they
23 asked, "Did you do the geocoding?" He said, "No, Ms. McCall
24 did." He also said, "Did you do the Spanish surname match?"
25 He said, no, Ms. McCall did both of those under his direction.

1 So, she was disclosed. First, they knew it.
2 Second, there was supplementation through the deposition, which
3 under the rule that is permissible supplementation of the
4 initial disclosure. The big question, which really I think
5 developed more in their reply, is whether she is an expert. I
6 don't think that she is an expert. She does not offer any
7 opinion. She's just presenting some facts. In the initial
8 argument of their motion, they said she's an expert, and they
9 gave two opinions that she offered, both of them from the same
10 paragraph in her declaration. And one was that almost all of
11 the former District E was now contained in District D. And
12 that's because in the document -- or the data she presented,
13 92.4 percent of the people that live there ended up in the new
14 district. So, she said almost all. 92.4, almost all.

15 The other opinion that they said she offered was
16 that the two districts, the former District E and new District
17 D are similar demographically. And that's because the data
18 showed that they had similar percentages of Hispanic voting age
19 population, citizen voting age population, and Spanish surname
20 registered voters. They were within about a percentage point
21 or so of each other on every one of those categories. I don't
22 think that's an opinion. That's just stating a fact, and a
23 fact that's borne out by the data she presented.

24 Now, is that a complicated process to present
25 that data? There may be some complication to it, but it's not

1 something that requires expertise. And I go back thinking to
2 the first time --

3 *THE COURT:* What's the dividing line?

4 *MR. HEATH:* I beg your pardon?

5 *THE COURT:* What's the dividing line between a little
6 complicated but not complicated enough to be -- to be
7 considered the stuff of expert testimony?

8 *MR. HEATH:* Well, I think the dividing line is whether
9 it requires --

10 *THE COURT:* In this case what's the dividing line?

11 *MR. HEATH:* -- some special expertise. And when I say
12 it's a little complicated, there are a lot of numbers involved.
13 And in my response I mention what she's doing on what I think
14 is the most complicated part, which is matching the names to
15 the Spanish surname list and geocoding the addresses. And
16 basically what that is, is you look at the list that the Harris
17 County registrar puts out. It has the person's name and the
18 addresses, registered voter. You look at the name. Let's say
19 it's Gonzalez. You look at the Spanish surname list, which is
20 published by the Census and it's in alphabetical order. You go
21 down to the Gs, and Gonzalez, of course, is a Spanish surname
22 and you check it off as being a Spanish surname. That requires
23 no expertise. Now, it may be a little complicated, because
24 there are a lot of names on the list. There are a lot of
25 registered voters, but it's an easy process.

1 The next thing you do is you look at the address
2 of the person, 123 Avenue D, whatever it happens to be. And
3 you look at the map and see if avenue -- 123 Avenue D is in the
4 old District B or the old District E. And if it is, you make a
5 mark. And then you go down to the next name and do the same
6 thing. And it requires no expertise to do that.

7 At the end of the day, you go back and you count
8 up all the Spanish surnames that are in the District D. You
9 match, you locate on a map, and you count. And that's what it
10 is. Now, because it's so big and because the data are
11 available digitally, you end up doing it on a computer, but
12 that's all that's happening. It's much the same sort of thing,
13 when I first got involved in redistricting, I was a legislative
14 aide, State Senate aide in 1971. And the Harris County state
15 senators, Democratic state senators, one of whom I worked for,
16 their aides were instructed to get together and try and draw
17 some state Senate districts. Of course, the real decision was
18 being made way above our pay grade, but we were doing that.
19 And it's the same sort of thing we were doing there, except we
20 were doing it with adding machines, not computers. So it's not
21 something that --

22 *THE COURT:* So this is just the abacus on steroids?

23 *MR. HEATH:* It wasn't an abacus, but I think it was
24 one of those adding machines where you had a crank on it rather
25 than the --

1 *THE COURT:* But what we're doing now, what you're
2 saying, is not different in kind, merely in -- not even
3 methodology, it is simply in the device used to accomplish it?

4 *MR. HEATH:* That's correct.

5 *THE COURT:* I'm not sure I agree. It seems to me that
6 the computer and its not only speed of performing arithmetic
7 computations, but its ability to synthesize and through
8 logarithms make -- not exactly inferences, but put information
9 together that allows a picture to be drawn that simply adding
10 up numbers would not permit you to draw. I think it is a
11 little bit different because of the use of algorithms to
12 predict outcomes and identify trends.

13 *MR. HEATH:* All right. With all due respect, Your
14 Honor --

15 *THE COURT:* I've reached beyond the limits of my
16 expertise. And it does seem to me that the kind of conclusions
17 she draws from the work she has asked the computer to do is
18 different from simply the computer equivalent of adding columns
19 of numbers and coming up with an arithmetic result. And that's
20 my only point, a limited one.

21 *MR. HEATH:* Right. And I would --

22 *THE COURT:* And it is not really specific to the issue
23 here.

24 *MR. HEATH:* Right.

25 *THE COURT:* It does bear on the nature of the

1 expertise as much as its existence.

2 *MR. HEATH:* The particular task done here -- and let
3 me say that I do not pretend to be a computer expert either.
4 And I think all the things you mention can be done by computer;
5 and if we were talking about the political science experts, who
6 do all their work on the computer, what you say, I think, would
7 be exactly right. But on this particular one, I think this is
8 just a matching program and the geocoding, I don't know how you
9 would describe that, but it takes -- the computer takes the
10 address and it sticks it on the map. It essentially puts a
11 dot on -- a computerized dot on the map and then it counts.

12 Now, there is one other thing -- and I want to
13 make sure I didn't gloss over this, and Ms. Perales mentioned
14 it, is that it does assign -- there is an assignment of citizen
15 voting age population to census blocks, and that does involve a
16 ratio. Again, it's a pure simple mathematical analysis -- it's
17 not an analysis. That's too much. Application. If half the
18 voters in a census block -- half the Hispanic voting age
19 population in a census block resides in a particular block, you
20 assign half the citizen voting age population. If 25 percent
21 do, you assign half -- 25 percent of the citizen voting age
22 population. That's all that is. So, that's all that's going
23 on here.

24 Now, as you mentioned -- or as I mentioned and
25 you mentioned at the beginning, we agree that this is not

1 essential to the case. It's supportive. It's helpful. It's
2 relevant. What it does in relation to the motion for summary
3 judgment is that it says that the old District E is very
4 similar to the new District D. Most of the data for that, as
5 is reflected in the table that -- in my response, where I took
6 her table and then showed where elsewhere in the summary
7 judgment proof the same data exists, is already in the record.
8 There are a few things that aren't, but most everything is.
9 But it just says that the old district, which is 92 percent
10 contained in the new one, is pretty much the same as the new
11 one. And that's relevant, because it shows that Mr. Wheeler,
12 who is Hispanic and is elected from District D, has been
13 elected twice.

14 *THE COURT:* You're going in -- okay. All right.

15 *MR. HEATH:* And so that's the only reason that it's
16 relevant.

17 *THE COURT:* Okay. All right.

18 *MR. HEATH:* But I don't believe this is expert
19 testimony. I don't think there's any need for a continuance.
20 I think the Court could reach the same conclusion looking at
21 the record that's elsewhere in the summary judgment proof,
22 almost all of which comes in through their expert and their
23 expert report, which we put into evidence, or the various
24 exhibits that they put in, and can essentially look at the map.
25 And, again, on the map, Ms. McCall, the only thing she did is

1 took one map that's in evidence, took the other map that's in
2 evidence, put them to the same scale and put one over the other
3 to make it easier to see. But you can just look at the map and
4 tell that they're essentially the same thing. You can't tell
5 it's 92.5, but you can tell it's around 90 percent.

6 *THE COURT:* Thank you.

7 *MR. HEATH:* So I think that this is not expert
8 testimony. She has been revealed, her existence, and what she
9 would testify to has been revealed at least through the
10 supplementation process, and we think that the evidence comes
11 in.

12 *THE COURT:* All right. Thank you. Let me hear
13 briefly from Ms. Perales on this.

14 *MS. PERALES:* Briefly, Your Honor. The parties used
15 demographers in these types of cases and did here, to testify
16 to the facts related to population, voting age population,
17 citizen voting age population, and even Spanish surname voter
18 registration, whereas here those people must be found in
19 districts that cut precinct boundaries. Mr. Ely and Dr. Rives
20 did this expert work in this case. They produced reports in
21 December of last year. They were deposed.

22 If Dr. Rives had included a plan overlap analysis
23 in his report in December of 2015, the plaintiffs would have
24 had notice and been able to talk with him about that and
25 provide a rebuttal report, if necessary. But the exact

1 opposite happened here. Dr. Rives said he wasn't going to look
2 at the 8-0 plan. He would make no analysis of the Hispanic
3 citizen voting age population in the 8-0 plan and no analysis
4 of Spanish surname registered voters in the 8-0 plan. That by
5 definition foreclosed a plan overlap analysis, and the
6 plaintiffs took him at his word.

7 The City does not address the fact that it didn't
8 disclose the geocoded database until August 3rd, after the
9 plaintiffs filed their response to the motion for summary
10 judgment. We're not saying that this was intentional. It just
11 happened. Demographers use different techniques to estimate
12 population, as the City agrees in its response, without access
13 to the geocoded database, and nobody had it until it was
14 revealed to us on August 3rd. We simply didn't have the same
15 information that the City had to even talk about plan overlap.
16 Thank you.

17 *THE COURT:* Thank you.

18 All right. I think I'm ready to rule on this
19 point. I take the City at its word, that this is not essential
20 to its summary judgment motion and that there is no need for a
21 continuance of that motion in order to address it, even if I
22 exclude Ms. McCall's declaration. And I do think that the
23 facts of the discovery that occurred, the timing of the
24 discovery that occurred and the extent of the discovery and
25 disclosures that occurred, not only warrant but almost require

1 exclusion, to avoid prejudice.

2 Again, I am not finding any kind of nefarious or
3 suspicious intent to withhold here at all. Please do not take
4 what I say as indicating that in any way. But the effect has
5 been to deprive the plaintiffs of information necessary to
6 fully understand what Ms. McCall did, the basis of it, and its
7 import for the case. Her conclusion about the similar
8 demographic composition of the current District E and former
9 District D is not trivial by any means. It does bear on some
10 of the most essential aspects of the argument that the
11 defendants have made, even if it is not essential to the
12 summary judgment motion. It is certainly germane to the
13 proportionality determination that the defendants have asked us
14 to rely so heavily -- to make in their favor and then to rely
15 so heavily upon, to put such weight on.

16 The information that was available before the
17 disclosure of her declaration in the belated material about her
18 existence, what knowledge she did have, and what role she might
19 play in the case, was both indeterminate and sketchy, too
20 indeterminate and too sketchy to provide the plaintiffs with
21 sufficient information to be aware of the extent to which
22 Ms. McCall would perform work, including the geocoding, the
23 extent to which it implicated expert work as opposed to
24 clerical, and the extent to which it could bear on the issues
25 and arguments that have been presented in the case.

1 So, I am going to grant the motion that the
2 plaintiffs have filed, asking me not to consider it as part of
3 the competent summary judgment record before me at this stage
4 of the case. That does not prevent the plaintiffs -- prevent
5 the defendants from considering -- from presenting it again or
6 presenting Ms. McCall a witness, if I deny summary judgment and
7 there is a bench trial on the Section 2 allegations, the
8 Fourteenth Amendment allegations, and the issue of a remedy.
9 That's my ruling. So the motion is granted to that extent. I
10 would note that the defendants' own argument says that even if
11 I did consider -- that even without considering it, I should
12 reach the same outcome.

13 *MR. HEATH:* Yes.

14 *THE COURT:* And that considering it would not change
15 the outcome in any way.

16 And at this time I think we are ready to move to
17 the outcome issue, that is, the summary judgment motion. And
18 this is the defendants' motion.

19 *MR. HEATH:* I may at some point put something on the
20 Elmo. Do you prefer where I stand or --

21 *THE COURT:* I don't care, as long as everybody can see
22 and hear you.

23 *MR. HEATH:* Let's see, is this --

24 *THE COURT:* Got it?

25 *MR. HEATH:* Thank you, Your Honor. We bring this

1 motion for summary judgment. Most --

2 *THE COURT:* Thank you, Steven.

3 *MR. HEATH:* -- voting right cases are typically pretty
4 fact intensive and have dueling experts and sometimes take a
5 lot of time, have demographic political science experts. And
6 they also require the plaintiff to prove up the *Gingles*
7 three-point test about whether they can draw a district that
8 has a majority of the voting -- citizen voting age population,
9 whether the population is politically cohesive, whether white
10 majority votes as a bloc, usually to defeat the minority
11 choice.

12 But in this case it is relatively unique in that
13 the experts pretty much agree. If you look at the two expert
14 reports or the expert reports from both sides, there's not a
15 lot of difference in them. Certainly on the numbers, I think
16 the parties agree.

17 *THE COURT:* Well, I think that the plaintiffs have
18 filed a helpful statement of where they don't agree that
19 certain things are undisputed.

20 *MR. HEATH:* Well, that's correct. We can --

21 *THE COURT:* Do you disagree with their description?

22 *MR. HEATH:* And we can certainly go through those.

23 *THE COURT:* Well, at some point we need to, I agree
24 with you. Do you disagree with any aspect of that description?

25 *MR. HEATH:* Yes, I do. And if you want, I can go

1 through those right now, each one.

2 *THE COURT:* Okay.

3 *MR. HEATH:* Let me --

4 *(Judge conferring with law clerk.)*

5 *THE COURT:* I've got it. I've got it. So defendants'
6 undisputed facts are laid out. Do you disagree that those are
7 undisputed?

8 *MR. HEATH:* Or that they are particularly relevant.

9 *THE COURT:* That's not the issue right now. The issue
10 is whether they are disputed.

11 *MR. HEATH:* I think that --

12 *THE COURT:* We'll talk about the extent to which
13 they're important, but that's not what I'm focusing on right
14 now.

15 *MR. HEATH:* Well, the first thing they mention is that
16 their expert says that 45.9 percent, I think it is, of the
17 population -- citizen voting age population is Hispanic, and we
18 say approximately half. I don't think there's any dispute or
19 any difference between those. The -- there is a question -- do
20 you want me to go through each of these?

21 *THE COURT:* Well, I just need to know, there's a first
22 sort of tranche, one through ten, are they all undisputed?

23 *MR. HEATH:* One through ten they say are undisputed --

24 *THE COURT:* And you agree?

25 *MR. HEATH:* -- and we agree they're undisputed.

1 *THE COURT:* Okay. Look at the disputed facts.

2 *MR. HEATH:* Right.

3 *THE COURT:* Do you think that any of those should, in
4 fact, be in the undisputed column?

5 *MR. HEATH:* All right. The first one, where the
6 45.9 percent is less than or is approximately half rather than
7 less than half, I don't think there's a dispute. It's
8 approximately half. It is less obviously. We don't dispute
9 the number.

10 The next question, I don't dispute what they say,
11 that these were the people elected to the council. I say that
12 two Hispanics were elected to the council before the new plan
13 went into effect and three after. I don't think either of us
14 disagree with that.

15 *THE COURT:* I think the question is, who is the -- is
16 what is -- here the issue is relevance.

17 *MR. HEATH:* Right, the issue is relevance.

18 *THE COURT:* Right. Okay. That sounds fine.

19 *MR. HEATH:* And I think that's irrelevant.

20 *THE COURT:* All right. But there's no dispute as to
21 the statements of fact laid out, correct?

22 *MR. HEATH:* Right.

23 *THE COURT:* Do you disagree with that, Ms. Perales?

24 *MS. PERALES:* Yes, Your Honor.

25 *THE COURT:* Okay. Very good. 13?

1 *MR. HEATH:* Okay.

2 *THE COURT:* Again, this goes to relevance.

3 *MR. HEATH:* I think that's correct. Well, let's

4 see --

5 *THE COURT:* Well, no, actually --

6 *MR. HEATH:* No, it --

7 *THE COURT:* -- it's a proposition --

8 *MR. HEATH:* I think we do have a dispute as to whether
9 there's a --

10 *THE COURT:* No, I disagree, but --

11 *MR. HEATH:* And that is the sole dispute really.

12 *THE COURT:* It is, but it's mixed law and fact,
13 because it makes an assumption about what is the proper
14 comparison to make, that is, is it the opportunity to elect
15 candidates that is proportional or is it the number of
16 districts that are proportional that are majority-minority.

17 *MR. HEATH:* Right.

18 *THE COURT:* And I think that's the legal issue that's
19 intertwined with 13.

20 *MR. HEATH:* That's right.

21 *THE COURT:* It's a blended issue of law and fact. All
22 right. And there's a dispute as to the legal issue.

23 *MR. HEATH:* Right.

24 *THE COURT:* And therefore the conclusion.

25 All right. 14?

1 *MR. HEATH:* In 14 they say that they do not have the
2 opportunity to elect in D.

3 *THE COURT:* Right.

4 *MR. HEATH:* We disagree with that.

5 *THE COURT:* Because of the coalition.

6 *MR. HEATH:* And we're going to argue about that.

7 *THE COURT:* And your argument is the coalition?

8 *MR. HEATH:* That's right.

9 *THE COURT:* All right. But not without the --

10 *MR. HEATH:* And 15, let's see --

11 *THE COURT:* 15 is the same thing.

12 *MR. HEATH:* I think this is irrelevant.

13 *THE COURT:* It's the argument of the -- well, it's
14 relevant to the dilutive effect that the plaintiffs assert of
15 the change to District B.

16 *MR. HEATH:* Well, except that they say that District B
17 is one -- they say in their response, that in those three
18 districts, A, B, and C --

19 *THE COURT:* No, it's majority-minority, but it's
20 bigger --

21 *MR. HEATH:* Right. That they have an opportunity --

22 *THE COURT:* Sure.

23 *MR. HEATH:* -- in those.

24 *THE COURT:* No, it's majority-minority, no question,
25 of Hispanic citizen voting adult population.

1 *MR. HEATH:* Right.

2 *THE COURT:* Nobody --

3 *MR. HEATH:* Nobody disputes that.

4 *THE COURT:* -- disputes that. Okay. Good.

5 *MR. HEATH:* Okay. In 16 --

6 *THE COURT:* 16.

7 *MR. HEATH:* -- District D is a district in which

8 Hispanics will elect --

9 *THE COURT:* That's the coalition.

10 *MR. HEATH:* That's a dispute.

11 *THE COURT:* That's the dispute over the

12 coalition's role?

13 *MR. HEATH:* That's right. That's what we're --

14 *THE COURT:* All right.

15 *MR. HEATH:* -- going to talk about.

16 *THE COURT:* 17?

17 *MR. HEATH:* 17 --

18 *THE COURT:* That's McCall. That's not in the case.

19 That's gone.

20 *MR. HEATH:* That's right. You know, it's not

21 essential to the case.

22 *THE COURT:* It's not the case at this time because her
23 declaration is not competent summary judgment evidence because
24 of the delay in disclosure and the prejudice that results.

25 *MR. HEATH:* Right. Although --

1 *THE COURT:* It may be in the case later, but it's not
2 now.

3 *MR. HEATH:* All right. I don't think you need to
4 determine that. I think you can determine much of that just by
5 looking at the stuff that is in the record, without looking at
6 her declaration, but still you don't have to decide that.

7 *THE COURT:* Okay.

8 *MR. HEATH:* 18, let's see. Well, again, I think we
9 have a dispute on that, as to whether District D is one where
10 there is a working coalition. But that is the dispute in the
11 case.

12 *THE COURT:* Right.

13 *MR. HEATH:* 19, again, they're making a point that
14 this is -- the experts say it's less than half. I'm saying
15 approximately half. Saying approximately half is beneficial to
16 them. I'm happy to say it's less than half. There's no
17 dispute of the facts.

18 *THE COURT:* All right.

19 *MR. HEATH:* 20, they say they don't know what we're
20 talking about. They're unable to respond, because it doesn't
21 state the facts. They're not in dispute. Basically the
22 relevant facts are census data, election returns, historical
23 fact. I don't think that this is something where they have --
24 that they are saying there was a disputed fact there, the way I
25 read 20.

1 *THE COURT:* All right. Thank you.

2 *MR. HEATH:* Okay.

3 *THE COURT:* Response?

4 *MR. HEATH:* All right.

5 *THE COURT:* Oh, wait. Okay.

6 *MR. HEATH:* Were you --

7 *THE COURT:* No. Go ahead.

8 *MR. HEATH:* Oh, I'm sorry.

9 *THE COURT:* Any disagreement on any of that?

10 *MS. PERALES:* Your Honor, only as to the very last
11 statement of fact, No. 20. It was a statement of fact saying
12 that -- characterizing facts, and so we simply just weren't
13 able to understand it. We couldn't agree to it or disagree
14 with it, so we just left it there. If the assertion is that
15 the sum total of relevant facts are contained in this list, we
16 would disagree, because we believe that lay witness testimony
17 and expert witness testimony have an important role in the
18 case.

19 *THE COURT:* All right. Thank you.

20 *MR. HEATH:* Well, in this case we are willing to
21 concede for the purpose of summary judgment here -- or the
22 summary judgment motion, not for the whole case, but for the
23 purpose of the summary judgment motion, that the plaintiffs can
24 prove the first -- the three elements of the *Gingles* threshold
25 test, which gets us into the courthouse and gets us to the

1 ultimate issue, which is does the plaintiff group, Hispanics in
2 this case, have an opportunity equal to the rest of the
3 electorate, to participate in the political process and to
4 elect candidates of their choice. And that's the ultimate
5 issue that has to be decided, and that's the one that they
6 cannot meet.

7 In 1994 the Supreme Court in *Johnson versus*
8 *De Grandy* talked about that exact issue and came up with the
9 proportionality test. In that case the lower court had found a
10 violation of Section 2. But it got to the Supreme Court, and
11 the Supreme Court said, We don't see how it is possible if
12 you're looking at a set of districts, where the minority group
13 in that case is predominantly Hispanic -- actually there were
14 two groups there, but have effective voting majorities in a
15 number of districts that is proportionate to their percentage
16 in the voting age population. And voting age population was
17 the measure they were using to consider. So if you have a
18 proportionate number of districts where you have effective
19 voting majorities, then you have equal opportunity.

20 *THE COURT:* Number of districts?

21 *MR. HEATH:* Number of districts.

22 *THE COURT:* Do you agree that that's the critical
23 basis for determination of proportionality?

24 *MR. HEATH:* That's right.

25 *THE COURT:* Okay.

1 *MR. HEATH:* And --

2 *THE COURT:* And it's not the number of candidates
3 elected. It's the number of districts?

4 *MR. HEATH:* That's exactly right, and that's the
5 difference between proportionality and --

6 *THE COURT:* I don't think that's what you did in your
7 argument. I think you did not focus on the number of
8 districts, unless you consider District D as a coalition
9 district to provide --

10 *MR. HEATH:* Yeah, right.

11 *THE COURT:* Okay. And so --

12 *MR. HEATH:* Certainly I do consider District D --

13 *THE COURT:* -- I think the argument depends on
14 accepting that.

15 *MR. HEATH:* That's exactly correct.

16 *THE COURT:* So at this time I suggest you move to that
17 argument, without which you cannot succeed.

18 *MR. HEATH:* Okay. We go to District D.

19 *THE COURT:* I'm at District D.

20 *MR. HEATH:* And in District D -- well, let me just --
21 I'm going to throw -- just so that we can see -- and this is a
22 map that was in Dr. Rives' report. It's in the summary
23 judgment proof. Except that for convenience, I've overlaid the
24 district lines so you can see. But A, B, and C have very
25 heavily Spanish -- Hispanic citizen voting age population

1 percentages. District D does as well, not quite as much. And
2 specifically if you look at the districts -- this is Table 1
3 from our report. District D has 42.5 percent Hispanic citizen
4 voting age population. And I will just mention here that I
5 will probably be talking about, and I suspect Ms. Perales will
6 be talking about, CVAP, which is the acronym for citizen voting
7 age population.

8 *THE COURT:* Sure. I think everybody understands that.

9 *MR. HEATH:* It saves a lot of time. It's a 43.5
10 percent CVAP district. That district in 2015 elected a
11 Hispanic. Now, it's a Hispanic without a Spanish surname, Cody
12 Ray Wheeler, but he is Hispanic. He identifies as Hispanic.

13 *THE COURT:* He was also the incumbent, correct, at
14 that --

15 *MR. HEATH:* Well, he was the incumbent, but he was
16 elected the first time in 2013 and thereafter --

17 *THE COURT:* But he was the incumbent at the time of
18 his election?

19 *MR. HEATH:* That's correct.

20 *THE COURT:* Okay.

21 *MR. HEATH:* He had been elected --

22 *THE COURT:* He was also targeted by --

23 *MR. HEATH:* -- in a similar district in the past.

24 *THE COURT:* He was also targeted my Mayor Isbell for
25 defeat, correct?

1 *MR. HEATH:* He was targeted for defeat. They spent
2 three and a half times as much as he did.

3 *THE COURT:* Right.

4 *MR. HEATH:* He --

5 *THE COURT:* And some of it was what I would call -- it
6 was a campaign that was aimed at non-Hispanic surname voters?

7 *MR. HEATH:* I don't know that the evidence shows that,
8 and that PAC --

9 *THE COURT:* Well, I'll let Ms. Perales speak to that
10 as well. Go ahead.

11 *MR. HEATH:* -- supported Hispanic and non-Hispanic
12 candidates.

13 *THE COURT:* I understand. But I'm talking about this
14 particular campaign.

15 *MR. HEATH:* But he -- he won. They spent at least
16 three and a half times as much as he spent. It was a three
17 person race. He got 58 percent of the vote. He got 55 percent
18 of the Anglo -- well, of the non-Hispanic vote. Sometimes we
19 may slip and say "Anglo vote," but what the experts have done
20 is look at Hispanic versus non-Hispanic. Most of that's going
21 to be Anglo, but it's the non-Hispanic.

22 *THE COURT:* In this area is there a significant Asian
23 population, for example?

24 *MR. HEATH:* No, or not a significant black population.

25 *THE COURT:* So it is the Anglo vote?

1 *MR. HEATH:* Right. So, anyway, he actually carried
2 the Anglo vote. But in Pasadena, of all the races studied by
3 the plaintiffs' expert, the Hispanic candidate or Hispanic
4 measure, identified measure, never got less than 28 point, I
5 think it's 3, a little under 30 percent of the non-Hispanic
6 vote in any election citywide. So presumably a Hispanic
7 candidate can expect to get 30 percent or more of the vote.
8 Mr. Wheeler got 55.

9 *THE COURT:* Of which vote? The --

10 *MR. HEATH:* Of the non-Hispanic vote.

11 *THE COURT:* But it depends on that coalition?

12 *MR. HEATH:* And that --

13 *THE COURT:* Is that correct?

14 *MR. HEATH:* And in that district, he got 55.

15 *THE COURT:* But it depends on attracting that
16 coalition, correct?

17 *MR. HEATH:* That's right. But he did. And he is a
18 Hispanic candidate of choice. He got 89.5 percent of the
19 Hispanic vote. There's no question --

20 *THE COURT:* Would he have won absent the coalition
21 for -- that is, absent the crossover voters, the Anglo voters?
22 Can we tell --

23 *MR. HEATH:* Well --

24 *THE COURT:* -- or does that just require speculation?

25 *MR. HEATH:* -- if every Anglo voted against him, he

1 probably would have lost.

2 *THE COURT:* Right. So it depended on their support?

3 *MR. HEATH:* And I think that's true in any -- in
4 virtually any election and maybe in -- I would have to do the
5 math, in Mr. Ybarra's district, where there's 70 percent
6 Hispanic CVAP. But it may have been that if he lost every
7 Anglo vote, he may not have won. I don't know. It depended on
8 the turnout.

9 *THE COURT:* All right.

10 *MR. HEATH:* But there is going to be some Hispanic
11 turnout. And what the *De Grandy* court said when it talked
12 about proportionality -- and the districts there were all
13 majority Hispanic districts. That's the way it was in Dade
14 County. But they said, We don't want this opinion to be
15 understood as encouraging people to go out and draw just
16 majority-minority districts. Because there are areas in the
17 country where you don't know a majority-minority district to
18 win. And in those districts you have a coalition between
19 different races and ethnic groups. And the Court made it
20 pretty clear that it felt that was better and it didn't want to
21 discourage that and it made sure that it didn't discourage
22 that.

23 And that's exactly what we have here. We have a
24 coalition that has worked, that is working, that has elected an
25 Hispanic candidate, who is the Hispanic favorite candidate,

1 because as I said, he got about 90 percent of the Hispanic
2 vote, 89.5 percent, and he has done it in a district that is
3 very heavily Hispanic, but not quite majority Hispanic. But
4 that is the kind of district *De Grandy* said we ought to be
5 looking at and we shouldn't discourage.

6 Now, the plaintiffs have said that *De Grandy*
7 applies and proportionality applies only to majority-minority
8 districts. I disagree.

9 *THE COURT:* What's your best authority for
10 disagreeing?

11 *MR. HEATH:* Well, I think the best authority is
12 *De Grandy* itself. Because *De Grandy* has that discussion,
13 saying we don't want to encourage people to go out and draw
14 majority-minority districts. And we may be getting into
15 semantics here, but *De Grandy* in its holding and in its
16 discussion didn't really talk about majority-minority
17 districts, except primarily where it was saying --

18 *THE COURT:* *Perry* did.

19 *MR. HEATH:* -- we don't want to encourage them.

20 *THE COURT:* *Perry* talked about it.

21 *MR. HEATH:* Who talks about it?

22 *THE COURT:* *LULAC versus Perry* talks about it.

23 *MR. HEATH:* *Perry*, it mentions there are
24 majority-minority districts. But going back to *De Grandy* --

25 *THE COURT:* *Bartlett* talks about it.

1 MR. HEATH: Pardon?

2 THE COURT: *Bartlett* talks about it.

3 MR. HEATH: Well, and I looked at *Bartlett* --

4 THE COURT: Actually they looked at the
5 majority-majority districts.

6 MR. HEATH: Right.

7 THE COURT: In fact, *Bartlett* talks about how
8 important that bright-line is.

9 MR. HEATH: Yeah. Justice Souter when he in *De Grandy*
10 set out the holding of the case in the second sentence of the
11 opinion and again in the next to the last paragraph of the
12 opinion, the term he uses is not majority-minority. It's
13 effective voting majority, where Hispanic have an effective
14 voting majority. And I would say --

15 THE COURT: Which opinion are you -- excuse me.
16 You're talking about *De Grandy*?

17 MR. HEATH: And that's *De Grandy*.

18 THE COURT: I'm talking about the later cases that
19 make this even more clear, I think.

20 MR. HEATH: Well, let's talk specifically -- well --

21 THE COURT: How do you deal with that one?

22 MR. HEATH: -- in *Perry*, when you're talking about --
23 in *Perry*, the cases in *Perry* or the districts at issue in *Perry*
24 were the Hispanic districts. Those were overwhelming Hispanic.
25 They were clearly majority Hispanic. So the question of

1 whether it's just above, just below didn't come up in *Perry* --
2 or in *LULAC*.

3 But *Bartlett*, they talk about 50 percent plus 1
4 majority. And I think there are two important takeaways from
5 *Bartlett*. Number one, the discussion in *Bartlett* is joined by
6 three judges: The Chief Justice, Justice Kennedy, Justice
7 Alito. They have a majority for the judgment, because Justice
8 Thomas and Justice Scalia disagree with the whole premise that
9 the Voting Rights Act covers vote dilution. They don't believe
10 it applies. They don't believe -- and in *Bartlett*, which was
11 discussing the first prong of the *Gingles* framework, Justice
12 Thomas says, I disagree with the *Gingles* framework altogether.
13 And so they essentially divorce themselves from any of that
14 discussion. They didn't have anything to do with it. You've
15 got three judges. You have four judges that go the other way.

16 Now, I have no doubt that on the decision that
17 was before *Bartlett*, those three were in the majority, because
18 they had those other two votes for the result. But if we're
19 looking at the discussion and the reasoning, they didn't have a
20 majority of the court. They had three judges.

21 *THE COURT:* But what *Bartlett* says is -- in language
22 that is common across the opinions, is that what you are
23 looking to is the relationship of the number of
24 majority-minority districts to the population -- the CVAP
25 population, and that's what matters.

1 MR. HEATH: And --

2 THE COURT: That's consistent across the plurality,
3 the concurrences and the dissents. What is different markedly,
4 I agree with you here, is the extent to which some of the Court
5 says you are required -- that you can require a city to
6 include -- to draw a coalition district to maximize voting
7 strength, but -- and the plurality says, no, you're not
8 required to do that. We are not forbidding it in the
9 appropriate case, but you're not required to in order to
10 achieve compliance with Section 2, with the *Gingles* factors.

11 MR. HEATH: I think the important thing about *Bartlett*
12 and on the other cases, we'll just have to go through those
13 individually to --

14 THE COURT: Well, I don't think that's what --

15 MR. HEATH: -- see, because I don't want to --

16 THE COURT: Okay. Go ahead.

17 MR. HEATH: -- to characterize every single one of
18 those. But on *Bartlett*, *Bartlett* was a *Gingles* one case.

19 THE COURT: No, I agree with that.

20 MR. HEATH: First prong of *Gingles*.

21 THE COURT: I agree with that, and the issue there is
22 how you treat these coalition districts and whether you are
23 able to require that one be created even if it is not
24 majority-majority, in order to maximize Hispanic voting
25 strengths.

1 *MR. HEATH:* My position is the *Gingles* one and the
2 ultimate issue --

3 *THE COURT:* A proportionality.

4 *MR. HEATH:* -- of equal opportunity --

5 *THE COURT:* Right.

6 *MR. HEATH:* -- are two different things. To have
7 equal opportunity to participate in the political process and
8 to elect candidates of your choice is not the same as --

9 *THE COURT:* I --

10 *MR. HEATH:* -- the threshold test of whether you can
11 get into court in the first place.

12 *THE COURT:* I don't disagree there is a difference
13 between the ultimate issue and the threshold hurdle. I don't
14 disagree with that.

15 *MR. HEATH:* And if you don't disagree with that --

16 *THE COURT:* Because you're still comparing the same
17 things.

18 *MR. HEATH:* Pardon?

19 *THE COURT:* You're still comparing the same things.

20 *MR. HEATH:* Well, you're comparing the same things as
21 Hispanic citizen voting age population --

22 *THE COURT:* And the number of districts.

23 *MR. HEATH:* -- percentages and so forth --

24 *THE COURT:* Exactly.

25 *MR. HEATH:* -- but --

1 *THE COURT:* The question --

2 *MR. HEATH:* -- you don't have to get to the same --
3 the point.

4 *THE COURT:* Of course not. And the question again
5 comes down to what we've already identified, is it proper to
6 consider the coalition district in this proportionality
7 calculus, number one, and what is the role of the
8 proportionality conclusion reached --

9 *MR. HEATH:* Right.

10 *THE COURT:* -- what weight does it get. So why don't
11 we go, again, directly to those issues.

12 *MR. HEATH:* Right. And in that case, if you have a
13 district that may not have a majority but that is effective and
14 it works, that's giving you equal opportunity. And I think the
15 best example of that is one -- and we're probably in the
16 district right now -- I mention it in my brief, two
17 districts --

18 *THE COURT:* Yeah, you told me that --

19 *MR. HEATH:* -- the 9th and the 18th.

20 *THE COURT:* Right.

21 *MR. HEATH:* Neither one of those has any
22 African-American majority.

23 *THE COURT:* I seem to remember hearing about those
24 districts before.

25 *MR. HEATH:* And, in fact, when I mentioned in 1971,

1 drawing districts on my hands and knees with those big maps on
2 the floor, Senator Jordan came in and said, You know, we need
3 to have the black majority district and said --

4 *THE COURT:* There's something about --

5 *MR. HEATH:* -- there doesn't need to be one.

6 *THE COURT:* There's something about this area that
7 brings out the inner anecdote. And I don't know what it is,
8 but war stories are just irresistible --

9 *MR. HEATH:* Right.

10 *THE COURT:* -- to those who have been through these
11 issues more than once.

12 *MR. HEATH:* But to have proportionality, I don't think
13 you can say that Al Green's or Shelia Jackson Lee's districts
14 are not ones where African-Americans have an equal opportunity
15 to participate and to elect and are not ones that should be
16 considered in a proportionality analysis, because they don't
17 have a majority. They have an effective voting majority, and
18 the people in D have an effective voting majority and they have
19 elected.

20 *THE COURT:* I would like to give Ms. Perales and her
21 colleague an opportunity to respond, so let me know when it's
22 appropriate to do that, please.

23 *MR. HEATH:* Okay.

24 *THE COURT:* Is this a good time? I mean, have you
25 laid out your argument?

1 MR. HEATH: Oh, I was going to say a couple more
2 things, if --

3 THE COURT: That's fine. Why don't you go and do
4 that.

5 MR. HEATH: -- I may. One is on the totality, there's
6 a question about, well, since the totality test, is summary
7 judgment ever appropriate. Yes, it is. *African-American*
8 *Voting Rights Legal Defense Fund*, which is one of the cases
9 decided in the wake of *De Grandy*, summary judgment case,
10 proportionality analysis.

11 Finally, what we have here is we have three
12 districts that everybody agrees are equal opportunity
13 districts. We have a fourth one where there's some
14 disagreement. But that one has elected and is represented by a
15 Hispanic candidate, who is the Hispanic candidate of choice.
16 So the plaintiffs seem to be saying, well, sometime in the
17 future, two years, four years, six years from now, a
18 Hispanic -- a different Hispanic may not win. And that's
19 hypothetical. It's speculative. We have districts now that
20 everybody agrees are equal opportunity districts or on the one
21 where there's some disagreement about, is represented by the
22 Hispanic, who is the Hispanic candidate of choice, and I would
23 suggest that they have no harm.

24 THE COURT: All right. I would like to --

25 MR. HEATH: If there's no harm, there's no standing.

1 *THE COURT:* All right. Let me now hear from the
2 plaintiffs.

3 *MS. PERALES:* Your Honor, I also have two
4 demonstrative exhibits, but --

5 *THE COURT:* All right. Would you hand copies to my
6 law clerk, please.

7 *MS. PERALES:* -- we also have hard copies --

8 *THE COURT:* Thank you. Is there an extra copy for my
9 law clerk? If you have two copies, that would be great.

10 *(Judge conferring with law clerk.)*

11 *MS. PERALES:* Your Honor, we're going to give the
12 third copy to your law clerk. Defendants received a copy
13 yesterday by PDF --

14 *THE COURT:* They need one now --

15 *MR. HEATH:* I can probably do without.

16 *THE COURT:* All right. Why don't you use it. They
17 can share.

18 *MR. HEATH:* I know what it is.

19 *THE COURT:* One at a time. They can share, unless you
20 have it to spare. All right?

21 *MS. PERALES:* Thank you.

22 *THE COURT:* And let's go. Ms. Perales.

23 *MS. PERALES:* Thank you, Your Honor.

24 The plaintiffs agree that there are both legal
25 and factual issues --

1 *THE COURT:* May I ask one question?

2 *MS. PERALES:* Oh, yes, of course.

3 *THE COURT:* Do you agree that we've identified the
4 right question, that is, the right one for the argument they
5 made -- it seems to me there are two questions. The first is,
6 as we said, is it proper to include the new District D because
7 it is a coalition district, number one, or not, in determining
8 proportionality; and if it is proper, what is the weight to be
9 given to the proportionality conclusion that is appropriately
10 drawn?

11 *MS. PERALES:* Yes, as to the second. One of the legal
12 issues is the weight of proportionality. The first legal issue
13 we would phrase is which districts count in the proportionality
14 analysis.

15 *THE COURT:* I think it's the same question.

16 *MS. PERALES:* Yes, Your Honor.

17 *THE COURT:* And the sub-question is, is it appropriate
18 to include the fourth new district or in comparing it to the
19 former districts when it was an 8-0 system or not?

20 *MS. PERALES:* Yes, Your Honor. And we would contend
21 just off the bat, that District D in the new 6-2 plan is best
22 characterized as an influence district and not a coalition
23 district for reasons that I will hopefully get to during the
24 argument.

25 *THE COURT:* I love these labels. It's not an

1 opportunity district, an influence district.

2 *MS. PERALES:* And if you survey --

3 *THE COURT:* Is that right?

4 *MS. PERALES:* If you survey Section 2 law --

5 *THE COURT:* Sure.

6 *MS. PERALES:* -- you'll see three very distinct kinds
7 of districts: Opportunity districts, coalition districts, and
8 then influence districts.

9 *THE COURT:* Right. And this one is somewhere between
10 2 and 3?

11 *MS. PERALES:* We would say it's firmly an influence
12 district, Your Honor.

13 *THE COURT:* All right. Is it even a coalition
14 district?

15 *MS. PERALES:* No, not at all.

16 *THE COURT:* Why not?

17 *MS. PERALES:* Because if you look at its performance,
18 it is a district in which the Anglo preferred candidate always
19 wins.

20 *THE COURT:* And sometimes it happens to be an Hispanic
21 preferred --

22 *MS. PERALES:* And sometimes --

23 *THE COURT:* -- candidate --

24 *MS. PERALES:* -- it happens to be a Hispanic
25 preferred --

1 *THE COURT:* All right.

2 *MS. PERALES:* -- candidate. And the elections that we
3 look at that we put in our summary judgment response are the
4 one election that's been --

5 *THE COURT:* Right.

6 *MS. PERALES:* -- held in this district, 2015, in which
7 an Anglo surnamed -- and honestly, Cody Ray is also, I think,
8 an indicator of Anglo identity. Cody Ray Wheeler wins the
9 district in the one election that's been held since it was
10 drawn. At the same time there was an at-large race that we
11 look at that was racially contested. Mr. Del Toro loses badly
12 in the district because he is not the preferred candidate of
13 Anglo voters, but he is a Hispanic. And we had three exogenous
14 elections that we look at, 20 -- 2008, 2012, and I believe,
15 '14 -- '10 and '12.

16 *THE COURT:* Right. And is an influence district of a
17 lesser ranking, if you will --

18 *MS. PERALES:* Yes.

19 *THE COURT:* -- than the coalition district?

20 *MS. PERALES:* Yes, Your Honor. And the cases will
21 bear that out.

22 *THE COURT:* I think that's correct. I just wanted to
23 clarify.

24 *MS. PERALES:* And so moving to the legal questions --
25 but before that, if the Court will bear with me, with expect to

1 the exhibits --

2 *THE COURT:* I'll accept your clarification of the
3 proper question.

4 *MS. PERALES:* Thank you. The Court has two maps and
5 behind them dated tables --

6 *THE COURT:* Yes.

7 *MS. PERALES:* -- to assist in our discussion today.
8 The first map which we'll draw our attention to is the old 8-0
9 map adopted in 2011 and --

10 *THE COURT:* This is the August 30 map?

11 *MS. PERALES:* Yes, and that's the brighter colored
12 map. And then the second map, which we've altered slightly to
13 give the district identifiers letters instead of numbers is the
14 new 6-2 map.

15 *THE COURT:* Right.

16 *MS. PERALES:* We wanted to point the Court's attention
17 to the 8-0 map, to look at the four districts on the north side
18 that at that time had a majority of citizen voting age
19 population and a majority of Spanish surname registered voters,
20 District A, in the northwest portion of the map.

21 *THE COURT:* The one you put the red square around on
22 the first map?

23 *MS. PERALES:* Yeah, the red square -- it is, but we're
24 pointing the Court to the bigger map, not the red square area.

25 *THE COURT:* All right. And I am going to -- you mean

1 the inset?

2 *MS. PERALES:* We are not pointing to the inset.
3 We're -- I just wanted to talk with the Court about the
4 larger --

5 *THE COURT:* All right.

6 *MS. PERALES:* -- the city map.

7 *THE COURT:* All right. And I'm going to mark this as
8 Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2 for the purpose
9 of this hearing.

10 *MS. PERALES:* Thank you, Your Honor.

11 *THE COURT:* They are admitted for the purpose of this
12 hearing, hearing no objection.

13 *MR. HEATH:* No.

14 *THE COURT:* All right. Thank you.

15 *MS. PERALES:* With respect to Exhibit 1, you will see
16 District A on the northwest side, Hispanic majority citizen
17 voting age population and Spanish surname voter registration.
18 District B on the far west side, also, majority Hispanic.
19 District C in the center of the north side, majority Hispanic.
20 And District D, on the northeast side of the city, is also
21 majority Hispanic. Turn -- in both citizen voting age
22 population and registered voters.

23 Turning to the 6-2 map, which is Exhibit 2, you
24 will see that District D is no longer where it was. It was
25 consumed by Districts A, B, and C. The act of drawing the city

1 into six portions as opposed to eight necessarily required each
2 district to become larger in population and less territory.
3 District D was -- disappeared or eliminated. Its district
4 identifier was moved down to a Hispanic minority, Anglo
5 majority district that sits roughly in the center of the city.

6 *THE COURT:* Okay. Say that again. Where was it moved
7 to?

8 *MS. PERALES:* So, D, which used to be in the northeast
9 portion, northeast portion of the city, was consumed by A, B,
10 and C.

11 *THE COURT:* Right.

12 *MS. PERALES:* And then the identifier D or the letter
13 D was given to a central city --

14 *THE COURT:* Right.

15 *MS. PERALES:* -- district that is majority Anglo.

16 *THE COURT:* The turquoise triangle?

17 *MS. PERALES:* Yes, that's right, Your Honor.

18 *THE COURT:* All right.

19 *MS. PERALES:* And so with those facts in mind and the
20 logical observations that Latinos still constitute just under
21 half the population in Pasadena, while it was possible to draw
22 four Hispanic majority districts in an eight district plan,
23 thus, providing rough proportionality. In a six district plan,
24 it is only possible to draw three Hispanic majority districts.

25 *THE COURT:* It is possible to also draw an influence

1 district?

2 *MS. PERALES:* It is an influence district, yes, Your
3 Honor, and that is the center --

4 *THE COURT:* And what is the role of the possibility of
5 doing that?

6 *MS. PERALES:* I could not speak to the City's goal in
7 drawing District D in the new plan.

8 *THE COURT:* What is its proper place in this analysis?

9 *MS. PERALES:* In the proportionality analysis, none,
10 Your Honor, for reasons that I will explain immediately.

11 *THE COURT:* Good.

12 *MS. PERALES:* Under *De Grandy* and its progeny, the
13 quality of opportunity is measured in terms of
14 majority-minority districts, no Anglo majority districts. In
15 *De Grandy* the Supreme Court asked whether there were, quote,
16 "majority-minority districts in substantial proportion to the
17 minority's share of the voting age population," unquote, at
18 page 1013, 1014.

19 There is no discussion in *De Grandy*, despite
20 repeated references to majority-minority districts, no
21 discussion of including minority-minority districts in the
22 proportionality analysis. And, in fact, the Court excluded an
23 African-American minority district from its proportionality
24 analysis when it was looking at African-American districts.
25 *De Grandy* unequivocally measured Latino majority districts and

1 black majority districts and compared that to the relevant
2 voter population, which in that case was voting age population,
3 but which we now use as the standard citizen voting age
4 population.

5 In *LULAC versus Perry*, again, the U.S. Supreme
6 Court made clear that proportionality turns on
7 majority-minority districts, and the Court counted only Latino
8 CVAP majority districts in its proportionality analysis.

9 As a side note, I know that my friend, Mr. Heath,
10 has talked about African-American districts that are not
11 majority African-American. That really doesn't bear on this
12 case, but I would like to point out to the Court that those
13 very same districts are around 35 percent Hispanic voting age
14 population, and nobody counts those as Hispanic opportunity
15 districts in the proportionality analysis.

16 So going back, proportionality does turn on
17 opportunity to elect, and opportunity to elect has been defined
18 time and time again in Section 2 cases as the majority of the
19 relevant population. And if one understands the concept of
20 opportunity to elect to be the same, under the *Gingles* test and
21 under the proportionality test, and we know the Court has been
22 moving more firmly in the direction of giving a bright-line
23 test for opportunity, that's what the Court did in *Bartlett*,
24 but you will also see a discussion of opportunity to elect in
25 terms of majority status in *Voinovich versus Quilter* and *Grove*

1 *versus Emison*. Just looking at the trajectory of Supreme Court
2 voting rights cases, you will only see opportunity to elect
3 defined as majority status.

4 *THE COURT:* What is the impact of the context being
5 different with a procedural posture being different? Here we
6 are not -- the *Gingles* factors have been assumed.

7 *MS. PERALES:* Yes.

8 *THE COURT:* We are on the Senate factors, the
9 proportionality analysis being one of them. What is the impact
10 of the difference in procedural postures?

11 *MS. PERALES:* The only guidance we have there, Your
12 Honor, is that the Supreme Court has only ever used majority
13 districts to analyze proportionality. And every other court
14 that we've looked at has only ever used majority districts. I
15 do not believe there's a reported case in which a less than
16 majority-minority district was used in the proportionality
17 analysis, including the case brought up by the City,
18 *African-American Voter Rights versus Villa*. That case also
19 looked at majority black districts when it was conducting a
20 proportionality test.

21 We would posit, Your Honor, that there's simply
22 no legal basis to look at less than majority districts in the
23 proportionality analysis, because they do not reflect the
24 Court's concept of opportunity to elect and, in fact, draw the
25 Court into an impossible morass of trying to evaluate whether a

1 less than majority district is an opportunity district in the
2 context of extremely localized factors involved in
3 jurisdictions such as the City of Pasadena.

4 *THE COURT:* So the bottom line is that -- in your
5 approach, is that it's not going to matter to using the
6 majority-majority districts as the relevant comparator, whether
7 we are in *Gingles* stage or Senate report stage?

8 *MS. PERALES:* We would observe that, Your Honor. But
9 I think the point is, is more that the Court has only used
10 majority -- majority-minority districts in its proportionality
11 analysis.

12 *THE COURT:* Fair enough. Fair enough. Okay.

13 *MS. PERALES:* Now, the City makes much of another part
14 of the *De Grandy* opinion, which talks about proportionality not
15 being a safe harbor. And it is that very different part of the
16 opinion where the Supreme Court says that it doesn't want
17 proportionality to become a safe harbor, because it believes
18 that it would lead to maximization.

19 This is not a case about maximization. The
20 plaintiffs are not asserting that a fourth majority Hispanic
21 district can be drawn in the 6-2 plan. In fact, the entire
22 point of this case is that a fourth district cannot be drawn,
23 and that's why we need to go back to the 8-0 configuration. So
24 when the Court talks about coalition districts and districts in
25 which minority voters are compromising with other groups, the

1 court is entirely confining that discussion to whether
2 proportionality should serve as a safe harbor. The Court says,
3 no, we don't want to create even more problems of
4 gerrymandering by encouraging jurisdictions to go crazy drawing
5 majority districts. That is a very separate discussion, we
6 would assert, from what counts in the proportionality analysis,
7 where you only hear from the Court that it's looking at
8 majority-minority districts.

9 And now as to the weight of proportionality, if
10 it's okay to move to the weight.

11 *THE COURT:* Sure. No, I think it's a good time.

12 *MS. PERALES:* *LULAC versus Perry* lists the Senate
13 factors and then right underneath that, as the City so
14 carefully points out after a paragraph break, lists
15 proportionality and it describes proportionality as another
16 relevant factor. Proportionality has never been described
17 as the greatest factor. It's never been described as
18 dispositive or somehow driving the ultimate outcome. In fact,
19 *De Grandy* probably stands for the exact opposite, because it
20 was so careful to say that proportionality could not be a safe
21 harbor.

22 In *LULAC*, which is our best guiding case, it's
23 relatively recent, it involves Texas, the Court even assumes
24 proportionality and still finds a Section 2 violation, because
25 it goes ahead and looks at the other Senate factors that were

1 present. And we would posit that Pasadena looks more like
2 Texas in *LULAC versus Perry* than St. Louis in *African-American*
3 *Voting Rights Fund versus Villa*. If you look at *De Grandy* and
4 you look at "*Via*" -- or *Villa*, probably, you see there that the
5 Court is weighing proportionality, but doesn't find very much
6 to weigh against it. In the St. Louis case, the Court only
7 found a splitting of blocks and a failure to maximize, weighing
8 against a finding of proportionality. And in *De Grandy*, the
9 Court weighs proportionality, and proportionality wins, because
10 there's very little on the other side of the scale.
11 Allegations of cracking and packing, which the Court says,
12 Listen, the line has to go somewhere. And so there's very
13 little there.

14 On the other hand, if you look at *LULAC*, you see
15 that the proportionality is outweighed by other factors,
16 because the Court saw a more deliberate attempt to change
17 district lines because of the impact that it would have on
18 minority voters. The Court doesn't find intent, but finds
19 enough there. And we believe that certainly there's enough in
20 the record here to create that kind of disputed fact on the
21 remaining Senate factors. This is not a situation where even
22 if there were proportionality, the door would somehow be shut
23 in terms of liability.

24 *THE COURT:* All right.

25 *MS. PERALES:* And I'll point the Court to page 16 of

1 our response brief, Docket 75, where we talk about some of the
2 issues involving racial appeals with respect to Mr. Wheeler in
3 particular and others.

4 *THE COURT:* Yes, I've read that.

5 *MS. PERALES:* Finally, Your Honor, it didn't come up
6 before with Mr. Heath, but we would argue that proportionality,
7 even if it existed, does not foreclose an intentional
8 discrimination claim. We do not believe that Section 2 is
9 somehow collapsed into the intentional discrimination analysis,
10 even though we agree that there has to be some kind of impact
11 in play in an intentional discrimination case. We don't
12 believe that somehow proportionality drives an outcome here
13 that would then drive an outcome in the intentional
14 discrimination claim.

15 I believe I have already discussed the factual
16 differences.

17 *THE COURT:* I think you have.

18 *MS. PERALES:* The reason, just to conclude, Your
19 Honor, that if you look at Section 2 cases and you look at the
20 way coalition districts are described, they provide a
21 consistent positive outcome --

22 *THE COURT:* Or influence districts?

23 *MS. PERALES:* No. Coalition districts.

24 *THE COURT:* All right.

25 *MS. PERALES:* Coalition districts provide a consistent

1 positive outcome for minority voters. And you hear this
2 discussed in *Bartlett* which actually had to do with --

3 *THE COURT:* Yes.

4 *MS. PERALES:* -- coalition districts.

5 *THE COURT:* Absolutely.

6 *MS. PERALES:* And so --

7 *THE COURT:* And still says you don't have to do it.

8 *MS. PERALES:* Right. They're not required.

9 *THE COURT:* Right.

10 *MS. PERALES:* But coalition districts, what makes them
11 different, is that they consistently perform for minority
12 voters. There's some group of Anglo or other voters that are
13 voting with them --

14 *THE COURT:* They have the opportunity to become --

15 *MS. PERALES:* Yes, and they share the same
16 preferences.

17 Influence districts, which is what District D is,
18 is one in which minority voters are occasionally able to
19 exercise enough influence to get their candidate over the
20 finish line, but it's not consistent and it's not reliable.
21 And if we look at the elections here, one election cycle, Cody
22 Ray Wheeler wins, Oscar Del Toro loses. And then of the three
23 exogenous elections, two losses, one win. And the win was the
24 farthest back in history. It was in 2008, which is considered
25 a somewhat extraordinary year for minority turnout.

1 So based on the facts that we have, there is no
2 history of performance by District D, that would lead us to
3 conclude that it was a coalition district. And, thus, the fact
4 is very much disputed whether District D offers the kind of
5 opportunity to elect that would allow it to be counted in the
6 proportionality analysis.

7 *THE COURT:* Thank you.

8 *MS. PERALES:* Thank you.

9 *THE COURT:* Mr. Heath, I'm going to give you one
10 opportunity to respond. It will be brief, since you were
11 thorough in your initial presentation.

12 *MR. HEATH:* I think the idea that D is simply an
13 influence district, that certainly understates the case.
14 Crossover, coalition, whatever you want to call it, I think
15 that it is at least there.

16 *THE COURT:* It's not majority-minority, is it?

17 *MR. HEATH:* It is not a majority Hispanic district.

18 *THE COURT:* And there were four?

19 *MR. HEATH:* Pardon?

20 *THE COURT:* There were four majority-minority
21 districts before and now there are three.

22 *MR. HEATH:* There were four, but if you look at those
23 four --

24 *THE COURT:* And now there are three.

25 *MR. HEATH:* -- if you look at the statistics --

1 *THE COURT:* Hang on. And now there are three?

2 *MR. HEATH:* I'm sorry?

3 *THE COURT:* And now there are three?

4 *MR. HEATH:* And now there are three, that's right.

5 *THE COURT:* All right.

6 *MR. HEATH:* And let me say first, that going from four
7 to three, to the extent that's a retrogression argument, that's
8 not relevant in a Section 2 case.

9 *THE COURT:* I know. It's a Section 5 issue.

10 *MR. HEATH:* So the question is, in the current plan do
11 they have equal opportunity, and you don't have to have a
12 majority-minority district to have equal opportunity. And to
13 quote *De Grandy*, "It is enough to say that while
14 proportionality in the sense used here is obviously an
15 indication that minority voters have an equal opportunity in
16 spite of racial polarization to participate in the political
17 process and to elect representatives of their choice, the
18 degree of probative value assigned to proportionality may vary
19 with the facts. No single statistic provides courts with a
20 shortcut to determine whether a set of single-member districts
21 unlawfully dilutes minority voting strength."

22 And I think that means -- and this is all in the
23 context of saying, We don't want to tell people that you have
24 to draw majority-minority districts, which is the entire
25 paragraph before, that it doesn't have to be majority-minority

1 districts. There are districts where minorities can elect,
2 working with other racial and ethnic groups, to elect the
3 candidates of Hispanic choice, and that's what happened here.
4 There is no doubt that Cody Ray Wheeler was the candidate of
5 Hispanic choice, much more so than he was the candidate of
6 Anglo choice. And, so, it's a district that does work, that
7 does provide opportunity, and no one has suggested that he is
8 anything but the candidate of overwhelming Hispanic choice.

9 I want to just take off of one thing that
10 Ms. Perales said at the end, talking about the intentional
11 discrimination claim and says we agree that there has to be an
12 impact on the intentional claim. And, of course, that's true
13 as well under the Section 2 claim. And that's the question.
14 Where is the impact? Where is the effect? Where is the
15 discriminatory effect? Because we know that in A, B, and C,
16 everybody agrees there is equal opportunity to -- for Hispanics
17 to elect in those districts. And in D, Hispanics do elect.
18 They do elect the candidate of choice of 89.5 percent of
19 Hispanic voters.

20 Under the prior plan, in A, B, and C and D at
21 that time, all of which had 50 percent or better Spanish
22 surname voter registration, Hispanics elected one Hispanic
23 candidate. Under the current plan, they elect two in the
24 Hispanic majority districts, three overall. There was -- by
25 the way, Wheeler was elected in the last cycle under the eight

1 district plan. But where is the impact? Where is the
2 discriminatory impact in the current plan? It provides equal
3 opportunity undisputed in A, B, and C and in D, as a practical
4 matter, it elects the candidate of Hispanic choice of 89.5.
5 Where is the impact? Maybe there will be some impact six years
6 from now, in a different time, and by that time the districts
7 are probably going to be changed, because it will be a new
8 census. But where is the current impact? If there is no
9 current impact, where is the standing?

10 *THE COURT:* All right.

11 *MR. HEATH:* Thank you.

12 *THE COURT:* Ms. Perales, did you want to address the
13 current impact argument and then I think I will be ready to
14 rule?

15 *MS. PERALES:* Well, Your Honor, first, we would urge
16 the Court not to count brown faces, because that's not what
17 Section 2 asks. Section 2 is about the election of Latino
18 candidates of choice, regardless of their race. And so we
19 would ask the Court to put aside the repeated assertions that
20 the election of a Hispanic candidate who is Hispanic preferred
21 is somehow an improvement over the election of an Anglo
22 candidate who is Hispanic preferred.

23 *THE COURT:* Particularly in the context of a factual
24 mix that includes a Hispanic identified Anglo surnamed
25 candidate.

1 *MS. PERALES:* Yes, Your Honor.

2 *THE COURT:* Mr. Cody Ray Wheeler.

3 *MS. PERALES:* Yes. And so putting aside how many
4 Hispanics serve on the council now or three years ago or four
5 years ago, the impact is that Latino voters comprise the
6 majority and had the opportunity to elect their preferred
7 candidate in four districts under the 8-0 plan. They only have
8 the opportunity to elect their candidate of choice in three
9 districts in the 6-2 plan. The district at issue, District D,
10 in one election has elected a candidate with an Anglo name.
11 There is no other surrounding evidence to suggest that it is an
12 opportunity district, neither its demographics nor its election
13 history. If you look at exogenous elections in those
14 precincts, tells us that this is a district that allows
15 Hispanic voters to elect their preferred candidate. So the
16 bottom line, once again, is we went from four to three, that's
17 the impact. Thank you.

18 *THE COURT:* All right. I am ready to rule.

19 I am going to deny the defendants' summary
20 judgment motion. I think that it is flawed in the argument it
21 presents in two ways. One is that the application of the
22 proportionality analysis, the framing of it, is at odds with
23 how the Supreme Court has said it should be applied, comparing
24 the number of either Hispanic candidates or even giving the
25 defendants a somewhat forgiving read, number of Hispanic

1 preferred candidates to the citywide Hispanic citizen age
2 voting population does not appear to be consistent with the way
3 the Court has consistently defined the proportionality
4 comparison of the percentage of majority-minority districts
5 based on Hispanic CVAP to the citywide Hispanic CVAP
6 population -- CVAP, period.

7 So when you do that calculation, when you compare
8 the number of majority-minority districts to the citywide
9 Hispanic citizen voting age population numbers, you come up
10 short with three majority-minority districts in the 6-2 system,
11 unless you are also able to count the fourth district, which is
12 not minority-majority -- or not majority-minority.

13 The question then boils down to, as we have said,
14 whether you can appropriately include the new District D as an
15 opportunity district or whether it is less even than a
16 coalition district, but rather merely an influence district.
17 The first question is, is that what it is? It's clearly not an
18 opportunity district. It's clearly not majority-minority. I
19 agree with the plaintiffs' assessment, that it is not even a
20 coalition district, because the election results that have
21 occurred in it and the way in which the numbers work makes it
22 clear that the only reason a Hispanic preferred candidate wins
23 is because it is the non-Hispanic voters preferred candidate.
24 And absent that, it would lose, that person would lose. Now,
25 that may be true as well in a coalition district, but this is

1 not an instance in which there is a sufficient predictable
2 regularity of coalescence between the preferences of the
3 Hispanic voters and the preferences of the non-Hispanic voters
4 to warrant inclusion in that category.

5 It therefore means that it's not
6 majority-minority. It's not even coalition. And even if it
7 was coalition as opposed to the lower influence district, it
8 still would not be appropriately included in this
9 proportionality analysis. I think the case law makes that
10 clear.

11 What is the harm? There is dilution. There is
12 dilution from two sources. One is the sheer reduction in the
13 number of districts, from four to three. The second is one
14 that gives rise not only to a strong inference of dilution and
15 prejudice, the impact generated from that, but is also part and
16 parcel of the intent analysis -- of the intent inference that
17 may arise from the facts that are presented here.

18 There is dilution, because in addition to
19 reducing the number of majority-minority districts from four to
20 three, as I said, the Hispanic votes are submerged in two ways
21 under the new 6-2 system. Number one, they are submerged by
22 being included in the at-large seats, which is a
23 well-recognized submergence in dilution technique. Number two,
24 the expansion of the other three districts in size, while not
25 taking them out of the majority Hispanic CVAP category, makes

1 them harder to achieve electoral victories in. So there is
2 somewhat of a submergence or at minimum a dilution there. But
3 the more profound dilution is the submergence of the Hispanic
4 votes, not in the larger districts, but rather into the
5 at-large districts.

6 And, finally, because I -- I think that the
7 proportionality analysis is flawed on one other ground, and
8 that is, to assume that if you have substantial proportionality
9 between whatever components you're measuring, whether you're
10 measuring it number of majority-minority districts compared to
11 total population or number of seats achieved. To assume, as
12 the defendants do, or to ask the Court to assume, that that is
13 the only important inquiry, the others having been assumed at
14 best, the *Gingles* threshold, not the Senator report factors,
15 that's the only important inquiry and once substantial
16 proportionality is achieved, you're done, nothing else needs to
17 be looked at, I think it's flawed. A, we don't have
18 substantial proportionality here properly viewed; and, B, even
19 if we did, that is not the end of the line. That is one of a
20 number of factors. It must be viewed in context. It is not
21 determinative. It is entitled to weight, no question, when it
22 is properly measured, arrived at, and supported. But it does
23 not get the privilege of being viewed outside the context of
24 and supported by the analysis necessary to determine history of
25 racially polarized voting, various barriers to participation in

1 the electoral process, all of the factors that the Senate
2 report identifies that may have application to the particular
3 facts. And the plaintiffs either asks the Court, even though
4 they say they don't -- I'm sorry, the defendants, either ask
5 the Court, although they deny and dispute it, for a safe harbor
6 treatment of proportionality, which the case law makes clear is
7 not appropriate, or they make it the only determinative -- the
8 only factor and determinative factor, which is not appropriate.
9 They give it too much weight.

10 And, finally, once we find no basis for granting
11 judgment as a matter of law, based on undisputed facts to
12 conduct the inquiry that does need to be conducted to intent,
13 Fourteenth Amendment violations, and the rest of the Section 2
14 issues, requires a record not presently before the Court. It
15 requires that some of the factual disputes material to these
16 findings and conclusions be explored through presentation of
17 evidence and that the necessary credibility determinations be
18 made and stated on the record. Case law is replete with
19 appellate court admonitions to or admonishments to district
20 judges in these kinds of cases above all, be clear and fulsome
21 in your credibility choice determinations, in your findings,
22 and how they lead to your conclusions of law. Show your work.
23 That's what we need to do.

24 We have a schedule. I propose to extend it by
25 two -- by 14 days, to give you a little bit more time. I can

1 extend it by 30 days, if you feel that that does not give you
2 too much time. We will have the bench trial before the
3 holidays. I'm happy to extend discovery for 30 days for the
4 limited purpose of having Ms. McCall's information made the
5 basis of her deposition presented to Mr. Ely, I think is the
6 person you wanted to present it to.

7 *MS. PERALES:* Yes.

8 *THE COURT:* Have a responsive report made by him, a
9 supplement based solely on that new information, and the
10 defendants may then depose him if they choose. That would be
11 the only additional discovery that we would contemplate. I
12 would think that 30 days might be enough for that to occur.

13 And what does that do to our joint pretrial order
14 due date? That's currently September 26? I'm looking at my
15 clerk.

16 *(Judge conferring with law clerk.)*

17 *THE COURT:* All right. So looking at the months,
18 September is Monday -- September 26 is Monday. If we were to
19 add 30 days to get a window for this additional discovery,
20 limited as it may be to occur, then we could have the joint
21 pretrial order due on -- and this is not quite 30 days, but we
22 can live -- okay. Joint pretrial order due October 21st.
23 Docket call October 26.

24 *MR. HEATH:* October when?

25 *THE COURT:* 26, which is a Wednesday, 8:30 a.m.

1 *MR. HEATH:* Your Honor, one thing, and I don't know if
2 it would be a problem with this, but if there's a way not to
3 have the trial during the week of the election.

4 *THE COURT:* I think we can manage that. That's fine.

5 *MR. HEATH:* I think we would like to avoid that.

6 *THE COURT:* That's fine. I would not like this to
7 trump any proceedings.

8 *MR. HEATH:* Right.

9 *THE COURT:* How about having the trial the week -- and
10 this will be somewhat chopped up because of other commitments,
11 but what about the week of the 14th -- starting on the 15th, to
12 be precise?

13 *MR. HEATH:* I think that probably works.

14 *THE COURT:* Does that work?

15 *MS. PERALES:* Yes, Your Honor. November 15?

16 *THE COURT:* Okay.

17 *MS. PERALES:* Okay. Yes.

18 *THE COURT:* It's a great date. And I propose that we
19 just churn on through that week until we get it done. I would
20 assume it will not take past the 18th, but we have the 21st and
21 22nd available, if we need it. And then we are on
22 Thanksgiving, and I assume that the parties will want to all
23 leave quickly on the 22nd, if not on the 23rd of November. Do
24 we have a schedule that works?

25 *MS. PERALES:* Yes, Your Honor.

1 *THE COURT:* All right.

2 *MR. HEATH:* I believe so.

3 *THE COURT:* All right. Proposed findings and
4 conclusions, I'm happy to receive them as part of the joint
5 pretrial order, with particular focus on the remedy. I do not
6 foreclose needing refined or amended, so let's make them
7 tentative before, and I will give each of you probably a week
8 after -- Happy Thanksgiving, sorry -- or maybe a little bit
9 longer to revise them in light of the evidence that may have
10 been presented. If you can get them to me the first week in
11 December, then I will try to get you a result before the world
12 sort of leaves at the end of the second week of December. But
13 it would have to be early that week. So there may not need to
14 be extensive revisions, but sometime, like, November -- or,
15 like, December 1st is when I would need them, in order for me
16 to get it out in the next two weeks, which is what you need,
17 unless I extend that to within the Christmas holidays, but I'm
18 sure it would be better for you to have it before and if
19 possible, for me to get it out before. That will be our goal.
20 All right?

21 *MS. PERALES:* Thank you, Your Honor.

22 *THE COURT:* Is there anything else we need to do
23 today? Thank you very much for a very thorough presentation
24 and materials. I'm going to be up here for a moment stacking,
25 but you are all free to leave. Thank you.

25